IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 138/2006with
CIVIL APPLICATION NO. 148/2006
ALONGWITH
FIRST APPEAL NO. 139/2006 with
CIVIL APPLICATION NO. 149/2006

FIRST APPEALS NO. 138/2006
with
CIVIL APPLICATION NO. 148/2006

Hardesh Ores Pvt. Ltd.,
a Company registered under the
Companies Act, 1956,
hiving its registered Office at
Vila Flores da Silva,
Erasmo Carvalho Street,
Margao, Goa. ..... Appellant.

Vs.

M/s. Hede & Company,
a Partnership Firm
registered under the Indian
Partnership Act, 1932 and having
its registered Office at
Dr. Malbarao Building
Rua Ismael Gracias, Panjim, Goa.

Through its partners :

(a) Shri Prakash Rajaram Hede,
Dr. Malbarao Bldg.,
Rua lsmael Gracias, Panaji, Goa.

(b) Shri Prafulla Rajaram Hede,
Dr. Malbarao Bldg.,
Rua Ismael Gracias, Panaji, Goa. ..... Respondents.

Mr. M. S. Usgaonkar, Senior Advocate with Ms. Amira Razaq and Ms. M. Noronha, Advocates for the appellant.

Mr. D. Lawande, Advocate for respondent No.1(a).

Mr. V. B. Nadkarni, Senior Advocate with Mr. Y. V. Nadkarni, Advocate for respondent No.1(b).

FIRST APPEAL NO. 139/2006
with
CIVIL APPLICATION NO. 149/2006

Sociedade de Fomento Industrial
Pvt. Ltd., a company registered under the
Companies Act, 1956,
having its registred Office at
Vila Flores da Silva,
Erasmo Carvalho Street,
Margao, Goa. ..... Appellant.

Vs.

M/s. Hede & Company,
a Partnership Firm
registered under the Indian
Partnership Act, 1932 and having
its registered Office at
Dr. Malbarao Building
Rua Ismael Gracias, Panjim, Goa.

Through its partners :

(a) Shri Prakash Rajaram Hede,
Dr. Malbarao Bldg.,
Rua lsmael Gracias, Panaji, Goa.

(b) Shri Prafulla Rajaram Hede,
Dr. Malbarao Bldg.,
Rua Ismael Gracias, Panaji, Goa. ..... Respondents.

Mr. M. S. Usgaonkar, Senior Advocate with Ms. Amira Razaq, Advocate for the appellant.

Mr. D. Lawande, Advocate for respondent No.1(a).

Mr. V. B. Nadkarni, Senior Advocate with Mr. Y. V. Nadkarni, Advocate for respondent No.1(b).

CORAM : P.V. KAKADE, J.

Date of reserving the Judgment :
12th October, 2006.

Date of pronouncing the Judgment :
20th October, 2006.

J U D G M E N T :

Both these appeals have arisen on account of the order passed by the trial Court dated 23.2.2006, rejecting plaints filed by the appellants-plaintiffs under Order 7, Rule 11(d) of the Civil Procedure Code on the ground that the same are barred by the law of limitation.

2. Heard learned Counsel for all the concerned parties in both the appeals. Rule. Rule made returnable forthwith by consent.

3. There were two companion suits bearing Special Civil Suit No. 23/2005/A and 24/2004/A, the first being filed by Sociedade de Fomento Industrial Pvt. Ltd., ("Fomento" for short) and the second filed by M/s.

Hardesh Ores Pvt. Ltd. (“Hardesh” for short). The respondents-original defendants (“Hedes” for short) are common in both the suits.

There are two agreements of the same date i.e. 23.10.1996, one for extraction or iron ore between Hedes and Hardesh and the other between Hardesh and Fomento for purchase of the ore extracted from the suit mine. Both the agreements were for 5 years from 1.1.1996 to 31.12.2006 in terms of clause 2.2 thereof. Plaintiff came with a case that the Hardesh and Fomento have categorically and willfully kept clause for renewal of the agreement to first five years term in respect of the said agreement which was to expire on 31.12.2001. According to the plaintiff, both the agreements contained a clause for renewal i.e. clause 2.2 and as per the said clause, the renewal was at the sole option of Fomento. The said clause 2.2 of the extraction agreement reads thus :

> “ Clause 2.2 : On the expiry of every 5 years, this Agreement shall stand renewed for further periods of like duration at the sole option of Fomento and shall be on the same terms and conditions as herein contained. Fomento shall be entitled to exercise this option during the entire period of the lease in respect of the said mine and renewals thereof, and until the remaining deposits of ore in the said mine can be economically exploited.”

The extraction agreement also contained clause i.e. Clause 15 whereby

Hedes were not entitled to authorise or permit any other person for that purpose. The said clause 15 reads thus :

> " Clause 15. During the subsistence of this Agreement, Hardesh solely shall be entitled to extract and deliver the ore from the said mine the Promisors shall not be entitled to authroise or permit any other person for that purpose nor shall the Promisors themselves or through their servants and/or agents extract, raise, remove, load, transport or deliver the ore from the said mine unless expressly authorised/agreed to by Hardesh in writing."

4. It is the case of the appellant-plaintiff that after entering into the said extraction agreement, the order of the Supreme Court dated 12.12.1996 in Writ Petition (Civil) No.202/95 was communicated by the Dy. Conservator of Forests vide his letter dated 12.02.1997, whereby there was prohibition to carry on mining activities in the forest areas unless the permission from the Ministry of Environment and Forest was obtained under the Forest Conservation Act, 1980. Besides the forest area, there was also privately owned areas where the consent of the surface right holders was required to be obtained by the respondents which was provided for in clause 2.5 of the Extraction Agreement. It is the case of Hardesh that it was only the Hardesh who was authroised to extract and

sell iron ore in terms of clause 15 of the extraction agreement, pursuant to which the Hardesh started extracting the ore and selling the same to Dempos. Prior to the expiry of the extraction and sale agreement, Hardesh and Fomento gave separate notices, both dated 4.12.2001 to Hedes for renewal under Clause 2.2 of the said agreements and the agreements stood renewed upto 31.12.2006. In pursuance of the agreement and prior to renewal Hardesh had done reconnaissance study consisting of geological fieldwork, collection of samples including face sampling and advanced money to Hedes. After the appellant-plaintiff got the knowledge that first stage forest clearance was obtained, Hardesh issued notice dated 17/5/2005 to Hedes to stop extraction activities and selling iron ore to any party which had been permitted under clause 15 of the extraction agreement. Prior thereto Hardesh had issued notice dated 27.4.2005 to Hedes requesting them to furnish the document to substantiate that the consent is obtained from the surface owners in respect of the privately owned areas. The notice dated 17.5.05 was served upon Hedes on 20.5.05. One month expired on 19.5.05 and it was the date given for the cause of action in the plaint as Hedes failed to furnish the documents inspite of the notice and Hardesh filed the suit for injunction on 4.8.2005.

5. In the said suit, the respondent moved a separate application for rejection of the plaint. Initially, the application was moved for rejection of the plaint under the provisions of Order 7, Rule 11(a) of the Civil Procedure Code, but that prayer was not pressed and only prayer of rejection of the plaint under Order 7, Rule 11(d) of the C.P. Code was pressed. The respondent sought rejection of the plaints on the ground that on the basis of the averments made in the plaint, the said claim, *ex facie* was barred by law of limitation and consequently, the plaint was liable to be rejected in terms of the said provisions of Order 7, Rule 11(d) of the C.P. Code.

6. The learned trial Judge, in both the suits, decided the application filed by the defendants under Order 7, Rule 11(d) of the C.P. Code and came to the conclusion that the ratio laid down by the Supreme Court in ***N.V. Srinivasa Murthy and others vs. Mariyamma (dead) by proposed LRs., and others.,*** 2005 AIR SCW 3346 was squarely applicable to the set of facts involved in the present case and concluded that the plaints were liable to be rejected and consequent order passed. The trial Judge was of the view that a mere meaningful reading of the plaint vis a vis the factual data disclosed therefrom, was sufficient to show that the suit was barred by limitation by virtue of Article 54 of Law of Limitation and

hence, the order of rejection of the plaints came to be passed. Hence, the present appeals.

7. Mr. Usgaonkar, the learned Senior Counsel for the appellants urged that the rejection of the plaint can be ordered only based on the averments in the plaint and the documents annexed to the plaint. The contentions raised in the defence or the submissions advanced by the defendants about the defendants' case are not to be considered in deciding the application under Order 7, Rule 11(d) of the Code of Civil Procedure. According to him, the learned trial Judge has fallen in error while passing the impugned order when he referred to the defence of the defendants to determine whether the plaint were liable to be rejected as those were barred by limitation. Mr. Usgaonkar also sought to put reliance on various rulings of the Apex Court, including the ruling in the case of ***Ramesh B. Desai and ors. vs. Bipin Vadilal Mehta and ors.*** (2006) 5 SCC 638 in order to seek support to his submission that the question of limitation was mixed question of law and fact and, therefore, it cannot be adjudicated unless the trial was held after raising the necessary issue. He also preferred to disagree with the learned trial Judge, by placing reliance on the principles laid down by the Apex Court in ***N.V. Srinivasa Murthy's case (supra)*** in order to reject the plaint.

Per contra, Mr. Nadkarni, the learned Senior Counsel on behalf of respondent No. 1(b), whose arguments are adopted by the other respondent, submitted that the ratio laid down in ***N.V. Srinivasa Murthy's case (supra)*** was squarely applicable to the present case and, therefore, the trial Judge has rightly rejected the plaints. According to him, after examining the pleadings in the plaint, it is apparent that by cleverly drafting of the plaint, the civil suit which was hopelessly barred by limitation, has been instituted by taking recourse to the facts and the plaint is camouflaged as a suit merely for perpetual injunction.

8. Now in order to appreciate the factual aspects involved in the dispute at this stage, it would be necessary to refer to paras 47 to 51 of the plaint, which according to the learned Counsel for the respondent, are sufficient to show that the suit is in fact for specific performance of the contract. Paras 47 to 51 of the plaint, read thus :

> " 47. The plaintiff states that there are valid, subsisting and binding agreements between the plaintiff, Fomento and the defendants, i.e. the said Agreements. The plaintiff and Fomento were at all material times and even today are ready and willing to perform the terms of the Agreements. Both the plaintiff and Fomento have preformed the obligation under the agreements.

48. The plaintiff states that, in view of Clauses 15 to 20 of the Extraction Agreement, which contains a negative covenant to the effect that the Defendants shall not carry out any mining activities in the said mine by themselves and shall not enter into any agreement, understanding or arrangement of whatsoever nature with any other party for working the said mine/lease, extracting ore therefrom, and/or carrying on any operation whatsoever in the said mine/lease, the Defendants are prohibited from carrying out any mining activities in the said mine by themselves and are also prohibited from entering into any arrangement with any third parties.

49. The plaintiff states that under the terms of the Extraction Agreement, particularly Clauses 9.2 and 12.1 thereof, the Plaintiff is entitled to forthwith commence mining activities in the said mine, including activities ancillary thereto and the defendants are prevented from in any manner stopping, interfering with or obstructing the plaintiff in any manner from carrying on the work of extraction, raising, loading and delivering ore and its other functions under and in accordance with the agreement. In view of the aforesaid rights conferred on the Plaintiff under the Extraction Agreement, the Plaintiff's are entitled to enter upon and work the said mine. The plaintiff proposes to do the operations in the forest area after the final clearance from the Ministry of

Environment and Forest Ministry and in the non-forest area immediately.

50. The plaintiff submits that the Extraction Agreement is specifically enforceable. The plaintiff states that to the extent possible they have performed their obligations and the plaintiff is willing to fully carry out its obligations as per the said agreement. The plaintiff was at all material times and even presently is ready and willing to perform the terms of the Extraction Agreement. The defendants have committed a breach of the Agreement as aforesaid by not acting according to the terms thereof and, by negating the agreement, prevented the Plaintiff from carrying out its function under the Extraction Agreement and Fomento from purchasing the ore.

51. The defendants were at all material times aware that the requirements of Fomento was to have captive production for purpose of Fomento's export commitments to foreign buyers. In fact, huge advances have been made by Fomento to ensure that such captive production from the said mine is available for export. It has been agreed and understood between the parties, as recorded in the Sale Agreement that the iron ore in the said mine is not an ordinary article of commerce. Moreover, as stated above, the Agreements are a composite and integrated scheme and both the

> agreements have to work together. The plaintiff states that the Agreements are specifically enforceable."

This apparently shows that the plaintiff has prayed for relief portion at paras 2(iv) that the defendants be directed to perform the negative covenant as contained in clause 15 and 20 of the extraction agreement dated 23.10.1996. A mere perusal of the pleadings as quoted above, particularly the expression "The plaintiff states that there are valid, subsisting and binding agreements between the plaintiff, Fomento and the defendants, i.e. the said Agreements. The plaintiff and Fomento were at all material times and even today are ready and willing to perform the terms of the Agreements. Both the plaintiff and Fomento have preformed the obligation under the agreements."; "The plaintiff submits that the Extraction Agreement is specifically enforceable. The plaintiff states that to the extent possible they have performed their obligations and the plaintiff is willing to fully carry out its obligations as per the said agreement. The plaintiff was at all material times and even presently is ready and willing to perform the terms of the Extraction Agreement." and "The plaintiff states that the agreements are specifically enforceable", read with the relief portion contained in para 2(iv) of the plaint clearly show that the foundation of the plaintiff's suit is for specific performance of the renewal of the Agreement dated 23.10.1996. The cause of action which arose on

29.12.2001 when they received the defendants' letter dated 29.12.2001 wherein they had clearly averred that the contention of the plaintiff in their letter dated 4.12.2001 that agreements stand renewed as alleged from 1.1.2001 to 31.12.2006 for any further period whatsoever is denied by them. On this background, it is to be seen that the plaintiff has filed the present suit on 4.8.2005. It is apparently after expiry of three years' and hence, the same appears to be barred by law of limitation by virtue of Article 54 of the Limitation Act.

9. Let us now turn to the ratio laid down by the Apex Court in ***N.V. Srinivasa Murthy's case (supra)***. The facts involved in that case were to the effect that the predecessor of the plaintiff borrowed money from the predecessor of defendants and by way of security, a registered sale deed was executed in 1953 which, according to the plaintiff in fact was merely a loan transaction with an oral agreement that on return of the borrowed sum, registered reconveyance deed shall be executed in favour of the borrower. Even after execution of the registered sale deed, the father of the plaintiffs and thereafter the plaintiffs continued to be in possession of the suit lands and paid the land revenue. Loan amount was repaid in 1987 and receipt was obtained from the defendants and the original registered sale deed dated 5.5.1953 was returned to the plaintiff with an oral promise

by the defendants to execute a registered document in favour of the plaintiffs. Subsequently, in revenue proceedings, mutation in the revenue records was made in favour of the defendant. The order of the Tehsildar and the Deputy Tehsildar was confirmed by Assistant Commissioner in 1994. The plaintiffs, thereupon filed second suit in 1996 for declaration that the plaintiffs were absolute owners of the suit land and for permanent injunction restraining the defendants from wrongfully entering with their peaceful possession and enjoyment.

The Apex Court on the above facts held that the foundation of the suit was the registered sale deed dated 5.5.1953 which, in fact, only a loan transaction executed to secure amount borrowed by the plaintiff's predecessor and the amount borrowed was fully paid back in 1987 and on the said averments, relief of declaring the registered sale deed to be a loan transaction and second relief of specific performance of oral agreement of reconveyance of the property by registered instrument should and ought to have been claimed in the suit and a suit merely for declaration that the plaintiffs were absolute owners of the suit land could not have been claimed without seeking declaration that the registered sale deed dated 5.5.1953 was a loan transaction and not a real sale and the cause of action seeking such declaration arose on 25.3.1987 when the plaintiffs claimed to have paid the entire loan and that the mutation proceedings before revenue

authorities did not furnish any fresh cause of action for the suit and they appear to have been made as a camouflage to get over the bar of limitation.

Therefore, I have no doubt whatsoever that the ratio laid down in ***N.V. Srinivasa Murthy's case (supra)*** is squarely applicable to the present case as it is seen from the reading of the plaint and the annexed agreements that the suit for injunction simplicitor is nothing but a camouflage to get over the bar of limitation which, in fact, shows that the specific performance is also implicit in the pleadings of the plaint itself. The plaintiffs' suits though styled as “the suit for injunction” is in fact the suit for specific performance of the renewal of the Agreement dated 23.10.96 for which, the cause of action had arisen on 29.12.2001 and the cause of action as averred by the plaintiffs in para 56 of the plaint has been made a camouflage to get over the bar of limitation.

10. Mr. Usgaonkar, the learned Counsel for the appellants urged that the ratio in the case of ***N.V. Srinivasa Murthy's case (supra)*** would not be applicable to the present suit as the application of the defendants under Order 7, Rule 11(a) of the Code of Civil Procedure i.e. lack of cause of action was not pressed and hence, the said ratio would not be applicable. However, I prefer to disagree with this submission. What is relevant is the

principle laid down by the Apex Court which is quite elaborately discussed above and, therefore, I am inclined to hold that the learned trial Judge has rightly rejected the plaints in both the suits under the provisions of Order 7, Rule 11(d) of the Code of Civil Procedure. It was further urged by Mr. Usgaonkar for the appellants that the ratio laid down by the Apex Court in ***Ramesh B. Desai's case (supra)*** holds the field in the sense that the question of limitation cannot be decided at the threshold of the suit on the basis of the application under Order 7, Rule 11(d) of the C.P. Code. However, in my considered view, there cannot be two opinions regarding the principle laid down by the Apex Court in ***Ramesh B. Desa's case (supra),*** however, the facts involved in that case appear to be such that the issue of limitation was a mixed question of law and fact and, therefore, it was held that the trial was necessary to determine the said issue. However, in the present case before us, without going to the pleadings and the documents of the defence, the very plaint and the documents annexed to the plaint, namely the agreement which is the basis of the suit, would show that in fact, it is a suit for specific performance of the agreement between the parties which appears to be barred by law of limitation by virtue of Article 54 of the Limitation Act. Hence, the submissions advanced in this regard on behalf of the appellant appear to be devoid of merits.

11. In the result, the appeals must fail and, therefore, stand dismissed with no order as to costs. Consequently, the civil applications also stand dismissed with no order as to costs.

P.V. KAKADE, J.

ssm.